80-434

No.

Supreme Court, U.S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SMITHKLINE CORPORATION,
Petitioner,

v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, AND THE UNITED STATES,
Respondents.

CONDITIONAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Comptroller General exceeded his statutory authority under 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) by demanding access to confidential financial records for purposes unrelated to the audit of particular government contracts.

2. Whether a contractor's cost records, including its records relating to indirect and unallocated costs, are "directly pertinent" to a negotiated government contract, within the meaning of 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), where the contract price is fixed without reference to the contractor's costs under procurement statutes that treat the competitive or market price as the fair price for products sold to the government.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. The Comptroller General's Demands	3
C. Issues Raised By The Comptroller General's Demands	6
D. Proceedings Below	8
REASONS FOR GRANTING THE PETITION	9
A. The Important Issues Raised By This Controversy Warrant Review	11
B. Certiorari Before Judgment Is Appropriate Here	16
CONCLUSION	18
APPENDIX A	1a
APPENDIX B	1b
APPENDIX C	1c

TABLE OF AUTHORITIES

CASES: Page

Bristol Laboratories v. *Staats*, 620 F.2d 17 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3136 (U.S. Aug. 21, 1980) (No. 80-264) ..... passim

Burlington Northern, Inc. v. *ICC*, 462 F.2d 280 (D.C. Cir.), *cert. denied*, 409 U.S. 891 (1972) 13

Eli Lilly & Co. v. *Staats*, No. IP-75-72-C (S.D. Ind. 1976), *reprinted at* 574 F.2d 919, *rev'd*, 574 F.2d 904 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978) passim

Hewlett-Packard Co. v. *United States*, 385 F.2d 1013 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968) 14

Johnson v. *United States Shipping Board Emergency Fleet Corp.*, 280 U.S. 320 (1930) 16, 17

McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) 16

Merck & Co. v. *Staats*, No. 74-1447 (D.D.C. 1977), *appeal pending*, Nos. 79-1435, 79-1438 (D.C. Cir. argued Feb. 11, 1980) ..... passim

New Haven Inclusion Cases, 399 U.S. 392 (1970) 16

Porter v. *Dicken*, 328 U.S. 252 (1946) 16

SmithKline Corp. v. *Staats*, 483 F. Supp. 712 (E.D. Pa. 1980), *appeal pending*, No. 80-1464 (3d Cir. filed March 19, 1980) ..... passim

United States v. *Abbott Laboratories*, 597 F.2d 672 (7th Cir. 1979) 3, 6

United States v. *Humble Oil & Refining Co.*, 488 F.2d 953 (5th Cir. 1974), *vacated and remanded*, 421 U.S. 943, *reaffirmed*, 518 F.2d 747 (5th Cir. 1975) .. 13

United States v. *LaSalle National Bank*, 437 U.S. 298 (1978) 13

Table of Authorities Continued

Page

STATUTES:

Armed Services Procurement Act of 1947, Section 4, 10 U.S.C. § 2313(b) ..... passim

Federal Property and Administrative Services Act of 1949, Section 304, 41 U.S.C. § 254(c) ..... passim

Military Appropriations Act of 1970, Section 408 13

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(e) 2

CONGRESSIONAL MATERIALS:

S. 2049, 93d Cong., 1st Sess. (1973) 13

S. 3014, 93d Cong., 2d Sess. (1974) 13

S. 2268, 94th Cong., 1st Sess. (1975) 13

96 Cong. Rec. 17045, 17123 (1951) 12

97 Cong. Rec. 12611, 13198-200, 13376-77 (1951) 12, 13

115 Cong. Rec. 25793, 25795 (1969) 13

OTHER AUTHORITIES:

Comment, *The Comptroller General's Authority to Examine the Private Business Records of Government Contractors: Eli Lilly & Co.* v. *Staats*, 92 Harv. L. Rev. 1148 (1979) 11, 12

Note, *Eli Lilly & Co.* v. *Staats: An Undue Expansion of the GAO's Investigatory Power Under The Access-To-Records Statutes*, 74 Nw. L. Rev. 122 (1979) 12, 14

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SMITHKLINE CORPORATION,
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v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, AND THE UNITED STATES,
Respondents.

CONDITIONAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SmithKline Corporation conditionally petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit, prior to the entry of any judgment by that court, to review the judgment of the United States District Court for the Eastern District of Pennsylvania. SmithKline requests that the petition be granted only if the Court grants the petition filed by the Solicitor General on behalf of the Comptroller General and the United States for a writ of certiorari to review the related decision of the United States Court of Appeals for the Second Circuit in

Bristol Laboratories v. *Staats*, 620 F.2d 17 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3136 (U.S. Aug. 21, 1980) (80-264).

OPINIONS BELOW

No opinion or judgment has been entered by the court of appeals. The opinion and judgment of the district court (App. A *infra*) is reported at 483 F. Supp. 712.

JURISDICTION

The judgment of the district court (App. A *infra*) was entered on January 24, 1980. SmithKline Corporation filed a timely notice of appeal on March 19, 1980 (App. B *infra*), in the United States Court of Appeals for the Third Circuit, where the case is still pending. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(e).

STATUTORY PROVISIONS INVOLVED

The statutory provisions relevant to this petition, Section 4 of the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. § 2313(b), and Section 304 of the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 254(c), are set forth in pertinent part in Appendix C, *infra*.

STATEMENT OF THE CASE

A. Introduction

This is one of five companion cases brought in four different Circuits arising out of a single controversy between the General Accounting Office ("GAO") and five companies, all of which are engaged in the manu-

facture and sale of pharmaceutical products.[1] The cases all arise from substantially identical letters sent to the five companies by the Comptroller General on August 26, 1974, demanding access to broad categories of confidential cost records alleged to be "directly pertinent" to contracts under which the companies had sold pharmaceutical products to federal agencies. They raise significant questions of statutory interpretation regarding the purposes for which the access-to-records provisions contained in 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) may be used, and the categories of records that fall within the limited access authority created by Congress.

In one of these five related cases the Solicitor General has recently filed a petition for a writ of certiorari. *Staats* v. *Bristol Laboratories,* No. 80-264 (filed August 21, 1980). Another of the cases involves this petitioner, SmithKline Corporation ("SmithKline"). A third involves Merck & Co. ("Merck"), which we understand also to be filing a conditional petition for certiorari, seeking review of a decision currently on appeal to the United States Court of Appeals for the District of Columbia Circuit.

B. The Comptroller General's Demands

The access-to-records demands made by the Comptroller General on August 26, 1974, were the result of efforts made by two United States Senators and

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[1] The other cases are *Eli Lilly & Co.* v. *Staats,* 574 F.2d 904 (7th Cir.), *cert. denied,* 439 U.S. 959 (1978); *United States* v. *Abbott Laboratories,* 597 F.2d 672 (7th Cir. 1979); *Bristol Laboratories* v. *Staats, supra; Merck & Co.* v. *Staats,* No. 74-1447 (D.D.C. 1977), *appeal pending* Nos. 79-1435, 79-1438 (D.C. Cir. argued Feb. 11, 1980).

their staffs to induce GAO to seek access to confidential cost records of pharmaceutical manufacturers. The Senators sought the confidential cost data in order to make them public.[2] In response to those efforts, GAO initially enlisted the voluntary cooperation of six leading manufacturers, including Bristol, SmithKline and Merck, to conduct a broad study of the economics of the pharmaceutical industry.[3] When it appeared that a voluntary study would not produce publishable information satisfactory to the Senators, the Comptroller General agreed with the Senators to attempt to compel the disclosure of confidential cost information by the same six companies.[4] The six companies were selected merely because of their status within the industry and their earlier voluntary provision of information to GAO.[5] The access-to-records demands of August 26, 1974, followed.

The Comptroller General sought to justify his demands on the basis of contracts under which the com-

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[2] App. A at 6a. *See also* the findings of fact entered in *Eli Lilly & Co.* v. *Staats*, No. IP-75-72-C (S.D. Ind. 1976), *reprinted at* 574 F.2d 919-925, *rev'd on other grounds*, 574 F.2d 904 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978).

[3] App. A at 7a-8a. *See also* Affidavit of Kenneth A. Bower, *reprinted at* Joint Appendix to the Briefs in the Third Circuit in No. 80-1464 ("Joint Appendix"), at 74.

[4] Deposition of Gregory J. Ahart, *reprinted at* Joint Appendix 196-200; Exhibits PA-27, PA-30 and PA-31 to the same deposition, *reprinted at* Joint Appendix 321, 324, 326; Joint Stipulation, *reprinted at* Joint Appendix 402-404.

[5] Exhibit PA-40 to the Deposition of Gregory J. Ahart, *reprinted at* Joint Appendix 331; Joint Stipulation, *reprinted at* Joint Appendix 402.

panies had sold various pharmaceutical products to government agencies. Each contract included standard access-to-records provisions required by one of two statutes, 10 U.S.C. § 2313(b) or 41 U.S.C. § 254(c).[6] The contracts were selected essentially at random from among several hundred such contracts entered into by the companies in 1974, all of which contained identical access provisions.[7] GAO had, and now has, no reason to believe that any impropriety was committed in connection with the contracts, that any excessive or unfair profit was made, or that any violation of law or other irregularity occurred.[8] No actual negotiations preceded the contracts, and no material cost data were sought by the agencies or relied upon by them in the award of the contracts.[9] GAO now seeks cost data, not to audit the performance of the contracts or to question the fairness of the contract prices, but to provide a vehicle for the study of "economic and operational"

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[6] Pertinent parts of the two statutes are set forth in Appendix C. In brief, Section 2313(b) requires a contractual provision assuring GAO access to records "that directly pertain to, and involve transactions relating to," the government contract. Section 254(c) requires a similar provision assuring access to records that are "directly pertinent" to, and "involv[e] transactions related to," the contract. The applicable statute depends on the governmental agency entering into the contract.

[7] Exhibits PA-7, PA-40 to the Deposition of Gregory J. Ahart, *reprinted at* Joint Appendix 245, 331; Joint Stipulation, *reprinted at* Joint Appendix 402.

[8] Deposition of Gregory J. Ahart, *reprinted at* Joint Appendix 100-01; Responses of Defendant Comptroller General to Plaintiff's Interrogatories, Set III, *reprinted at* Joint Appendix 339, 341; Joint Stipulation, *reprinted at* Joint Appendix 403-04.

[9] Affidavit of Kenneth A. Bower, *reprinted at* Joint Appendix 75-76.

aspects of the pharmaceutical industry requested by the two Senators.[10]

The Comptroller General's demand, made in the letters of August 26, 1974, includes, but is not limited to, all "records of experienced costs," all records that provide "support for prices charged to the Government," and any other information deemed necessary by GAO to allow it to review "the reasonableness of the contract price and the adequacy of the protection afforded the Government's interests." These broad categories of materials are demanded even though the information was not sought by, submitted to or relied upon by the contracting agencies, even though the companies may not have considered the information in fixing the prices charged to the government, and even though the cost or expenditure reflected may not be allocated to any product sold to the government.

C. Issues Raised By The Comptroller General's Demands

Following the access-to-records demands of August 26, 1974, four of the companies, including SmithKline and Bristol, brought actions for declaratory and injunctive relief. The United States itself brought suit against a fifth company to enforce the demand.[11]

In four of the five cases, including the action brought by SmithKline, two principal issues were presented. First, SmithKline and the other companies contended that the Comptroller General's demands exceed his statutory authority because they reflect an improper

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[10] Exhibit PA-10 to the Deposition of Gregory J. Ahart, *reprinted at* Joint Appendix 264.

[11] *United States* v. *Abbott Laboratories, supra.*

purpose. The companies pointed out that the statutory provisions relied upon by the Comptroller General were the products of extensive and detailed legislative consideration, in which Congress made clear that access to contractors' records could be required only for narrow and specific purposes. Access was permitted to audit cost data submitted in connection with specific negotiated contracts, in order to detect fraud or overreaching, but it was not available to conduct economic studies or surveys, or generalized studies of procurement techniques, or to gather information for the use of individual Senators or their staffs.[12]

Second, assuming *arguendo* the legitimacy of the purpose underlying the demands, the four companies contended that the Comptroller General is not entitled under the access provisions to the cost data he demanded. Among other limitations, the companies argued that GAO should be afforded access only to data that are the subject of negotiations or are relied upon by the government agencies responsible for awarding the contracts.

In the action brought by Bristol, on the other hand, only one aspect of only the second of these issues was presented. The validity of the Comptroller General's demand was not challenged by Bristol or decided by either the district court or the court of appeals. Furthermore, since Bristol agreed voluntarily to make available to GAO records relating to various costs allocated by Bristol to the products sold, the only issue decided by those courts involves the scope of the

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[12] The extensive legislative history upon which SmithKline and the other companies have relied is briefly summarized below. *Infra* at 12-13.

Comptroller General's authority to review records relating to unallocated costs.[13] That is, therefore, the sole issue presented in the petition for a writ of certiorari filed in *Bristol* by the Solicitor General on behalf of the Comptroller General and the United States.[14]

D. Proceedings Below

SmithKline brought this action for declaratory and other relief against the Comptroller General in the United States District Court for the Eastern District of Pennsylvania on February 10, 1975, to challenge the validity and scope of the access-to-records demand of August 26, 1974. As it did in *Bristol Laboratories,* the United States intervened as a defendant and counterclaimed for enforcement of the Comptroller General's demand.[15] On January 24, 1980, the district court granted summary judgment to the United States, sustained the validity of the Comptroller General's demand, and ordered SmithKline to produce to GAO a wide variety of confidential cost records. (App. A at 19a-20a). These included extensive records relating to matters as to which GAO was denied access in *Bristol Laboratories,* including unallocated costs of research and development, advertising and promotion, distribution and administration.[16] SmithKline filed a timely notice of appeal, and the matter is now pending before

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[13] Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in No. 80-264 (Petition in No. 80-264), at 5-6.

[14] *Id.* at Question Presented.

[15] Order of May 12, 1975, *reprinted at* Joint Appendix 31. *Compare* Petition in No. 80-264, at 5.

[16] *Compare* App. A, *infra,* at 19a; Petition in No. 80-264, at 6-8.

the Court of Appeals for the Third Circuit.[17] Oral argument has not yet been held, and no judgment or opinion has been issued by the court of appeals.

REASONS FOR GRANTING THE PETITION

SmithKline believes that the specific issue presented in *Bristol,* whether records of unallocated costs can be "directly pertinent" to a government contract under the access-to-records provisions, was correctly decided by the district court and court of appeals, and that further review of that issue is not warranted at this time. As the court of appeals emphasized there, the Government's limitless interpretation of the access-to-records provisions set forth in 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) would permit GAO access to "virtually all" of a contractor's confidential cost records (Petition in No. 80-264, at 9a), even though the costs were not allocated to the products sold and were not relied upon or sought by the government agency in awarding the contract. A single fixed-price contract, no matter how insignificant in amount, would allow GAO "to discover virtually everything there is to know about the contractor's business." *Id.* at 10a. The legislative history of the access provisions,[18] much of which is ignored in the Government's petition for certiorari, makes clear that Congress did not intend any such "unusual and unfettered" right of inspection. *Id.*

Contrary to the Solicitor General's suggestion (Petition in No. 80-264, at 9), review of *Bristol* by this

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[17] No. 80-1464 (3d Cir. filed Mar. 19, 1980).

[18] *See, e.g.,* pp. 12-13, *infra.*

Court cannot fully avoid either the risk of conflicting decisions or "further litigation in other Circuits" (*id.*). Review of *Bristol* alone cannot address the underlying issue of the validity of the purpose for the GAO's demand, nor can it resolve the broader questions presented in both *SmithKline* and *Merck* regarding the proper scope of the access-to-records provisions. Although review of *Bristol* may resolve the particular question presented there, it would leave open the possibility of decisions in *SmithKline* or *Merck* that would conflict with *Lilly* on other issues, thus stimulating subsequent petitions in those cases by one or another of the parties. Considerations of efficiency and economy indicate that, if the issue presented in *Bristol* is to be reviewed at all, it should occur in connection with *SmithKline* or *Merck*, after this Court has the advantage of the opinions of the Third and District of Columbia Circuits.

If, however, the Court were to grant certiorari in *Bristol*, certiorari should also be granted here.[19] *Bristol* raises only one of the several issues arising from this controversy, and the entire dispute can be resolved at one time and in one decision by this Court, without danger of repetitive proceedings, only if this case and *Merck* are reviewed simultaneously. This Court has in comparable situations granted certiorari before judgment by a court of appeals in order to avoid duplicative and needlessly burdensome litigation.

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[19] As indicated above, SmithKline understands that a conditional petition for a writ of certiorari is also being filed in *Merck*. Although the district court opinions in *SmithKline* and *Merck* reach different results, the issues and factual circumstances of the two cases are essentially identical. If certiorari is granted in *Bristol*, SmithKline believes that review should be granted of *Merck*, as well as *SmithKline*.

A. The Important Issues Raised By This Controversy Warrant Review

If, as the Government suggests, review by this Court is required in *Bristol* to establish the proper construction of the access-to-records provisions, "applicable to virtually all of the government's negotiated procurement contracts across the country" (Petition in No. 80-264, at 9), the public importance of the questions presented in *SmithKline* seems beyond dispute. While *Bristol* offers for decision only one aspect of the proper interpretation of the access provisions, regarding records of costs unallocated by a manufacturer to particular products, the questions in *SmithKline* involve wider and more fundamental aspects of the proper construction of the same access provisions.

The first issue posed by *SmithKline,* but not presented by *Bristol,* is whether the Comptroller General has exceeded his access-to-records authority by employing it for a purpose unrelated to the audit of a particular contract. Reflecting the limited nature of the question presented in *Bristol,* the Government's petition in that case does not refer either to this issue or even to the origins of the access demand challenged in these cases. SmithKline, unlike Bristol, has urged that GAO's authority may not be used either to collect cost data for individual Senators or to conduct generalized studies of industry economics or procurement techniques.[20]

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[20] While the issue was not considered in *Bristol,* it was addressed by the Seventh Circuit in the related *Lilly case.* The decision of a divided panel of that court in favor of the Government, which rested on a legal theory never advanced by the Government, has been the subject of sharp criticism from scholars. Comment, *The Comptroller General's Authority to Examine the Private Business*

Because of Bristol's decision voluntarily to provide the Comptroller General with certain cost records, a second issue in *SmithKline,* but not in *Bristol,* is whether any cost records can be "directly pertinent," within the meaning of the access-to-records provisions, to contracts which are not cost-based. *SmithKline* therefore permits the Court to determine far more comprehensively than it can in *Bristol* the proper construction of the access provisions, in terms both of the purposes for which they may be used and the records to which they afford access.

The legislative history of the access provisions, only selected portions of which are described in the Government's petition in *Bristol,* confirms the substantiality of the additional issues presented in *SmithKline* and *Merck.* It shows clearly that Congress adopted the access provisions specifically in response to changes in government contracting at the time of the Korean War in order to detect "fraud or overreaching" or "anything untoward" by contractors.[21] The legislation's sponsor repeatedly declared that he sought to deter "improprieties" in connection with the award of particular government contracts.[22] The "directly pertinent" language was added to the two access provisions to make unequivocal their purpose, and to prevent

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Records of Government Contractors: Eli Lilly & Co. v. *Staats,* 92 Harv. L. Rev. 1148 (1979); Note, *Eli Lilly & Co.* v. *Staats: An Undue Expansion of the GAO's Investigatory Power Under The Access-To-Records Statutes,* 74 Nw. L. Rev. 122 (1979).

[21] 96 Cong. Rec. 17123 (1951) (remarks of Rep. Celler). *See also id.* at 17045 (1951) (remarks of Rep. Marcantonio).

[22] 97 Cong. Rec. 13198-200, 12611 (1951) (remarks of Rep. Hardy). *See also id.* at 13200 (remarks of Rep. Riehlman).

generalized "snooping" by GAO.[23] Contrary to the Government's suggestion in its petition in *Bristol,* there is ample evidence that GAO understood contemporaneously the legislation's narrow terms and purpose, and that it has, until the initiation of this litigation, consistently accepted those limits.[24]

This legislative and administrative history shows clearly that important questions are presented in *SmithKline* regarding the proper application of the access-to-records provisions. As indicated by the results reached in other cases in which powers granted to the Government for one purpose were utilized for other purposes, the Comptroller General's demands exceed his statutory and contractual authority. *United States* v. *LaSalle National Bank,* 437 U.S. 298, 316-17 (1978); *United States* v. *Humble Oil & Refining Co.,* 488 F.2d 953, 954, 962-63 (5th Cir. 1974), *vacated and remanded,* 421 U.S. 943, *reaffirmed,* 518 F.2d 747, 748-49 (5th Cir. 1975); *Burlington Northern, Inc.* v. *ICC,* 462 F.2d 280, 286-88 (D.C. Cir.), *cert. denied,* 409 U.S. 891 (1972).

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[23] 97 Cong. Rec. 13377 (1951) (remarks of Rep. Hoffman). *See also id.* at 13376 (remarks of Rep. Harvey).

[24] Exhibits PA-38, PA-44 through PA-50 and PA-53 through PA-61 to the Deposition of Gregory J. Ahart, *supra* at n.4. Congress has only once granted the Comptroller General the power to conduct an economic study. *See* Military Appropriations Act of 1970, P.L. 91-121, § 408, 83 Stat. 208. Significantly, the special authority was limited to one year, and "only a single study." 115 Cong. Rec. 25793 (1969) (remarks of Senator Proxmire); *id.,* at 25795 (remarks of Senator Ribicoff). In 1973 and again in 1975 Congress declined to act on several proposals from the Comptroller General to grant him access to contractor records for precisely the type of profit study proposed here, whenever the contractor aggregated more than $1,000,000 of government contracts in the most recent fiscal year. *See* S. 2049 and S. 3014, introduced in the 93rd Congress, and S. 2268, introduced in the 94th Congress.

The other important issue presented by *SmithKline* in the Third Circuit and by *Merck* in the District of Columbia Circuit—whether any cost records can be "directly pertinent" to contracts which are not cost-based—also warrants review by this Court.[25] The same legislative history which demonstrates the limited purposes for which GAO may invoke its access-to-records authority also supports a narrow reading of the records which may be deemed "directly pertinent" to a contract. Nor does the Ninth Circuit's decision in *Hewlett-Packard Co.* v. *United States,* 385 F.2d 1013 (9th Cir. 1967), *cert. denied,* 390 U.S. 988 (1968), which was premised on a sweeping conception of the term "contract," provide convincing proof to the contrary.[26]

In these circumstances, review by this Court of *Bristol* alone cannot fully resolve the important ques-

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[25] This issue divided the Seventh Circuit in *Lilly*. Judge Pell, in dissent, 574 F.2d at 919, endorsed the district court's conclusion that such records could not be deemed directly pertinent to the contracts at issue, since "neither the negotiations nor performance terms of the contracts were in any way dependent upon, or directly related to, Lilly's costs of production, profits or methodology by which Lilly establishes its prices, including its standard catalog prices." 574 F.2d at 925.

[26] *Hewlett-Packard* held that certain records relating to direct costs may be "directly pertinent" to non-cost-based contracts, but it rests on a strained analysis of the access-to-records provisions that has not been adopted by the Government and has been vigorously criticized by others. *See, e.g., Eli Lilly & Co.* v. *Staats,* 574 F.2d at 918-19 (Pell, J., dissenting); Note, *Eli Lilly & Co.* v. *Staats: An Undue Expansion of the GAO's Investigatory Power Under the Access-to-Records Statutes, supra,* 74 Nw. L. Rev. at 130-31. While the decision supports the conclusion reached by the Second Circuit in *Bristol,* the limited issue presented there, because of Bristol's undertaking to produce records relating to certain of its direct costs, meant that *Hewlett-Packard* was never carefully scrutinized in light of the issues presented here.

tions of statutory interpretation arising from the Comptroller General's demands. If, as the Solicitor General urges, both government agencies and contractors require guidance as to the proper construction of the access-to-records provisions, such guidance cannot be provided solely in the context of a case which considers only one aspect of the two major interpretative questions raised by the demands. A comprehensive assessment of the scope and meaning of the access provisions by the Court is possible only if review is granted simultaneously here.

Review of *SmithKline* would also assist the Court in resolving even the single issue presented in *Bristol*. The question in *Bristol* is ultimately whether records of unallocated costs are "directly pertinent" to fixed-price contracts. A principal question in *SmithKline*, subsuming the question in *Bristol*, is whether any cost records, no matter if the costs are allocated or not, can ever be "directly pertinent" to a fixed-price contract for which cost data were neither sought nor relied upon by the contracting agency. Both questions depend on Congress' purpose in enacting the access-to-records provisions, as that purpose is reflected in legislative and administrative history. The Court's assessment of that purpose and that history will be assisted by joint consideration of the full range of questions arising from the access provisions.

If the Court were to grant certiorari in *Bristol*, and undertake to construe the "directly pertinent" language of the access provisions, efficient judicial administration would be served by the resolution of all of the issues arising from that language at one time and in one decision. To review *Bristol* alone, and to

leave *SmithKline* and *Merck* to proceed independently in the courts of appeals, merely invites subsequent proceedings in this Court, in which the same provisions would again be reviewed in the context of more comprehensive issues. Such repetitive proceedings can only impede the prompt and efficient resolution of this controversy.

B. Certiorari Before Judgment Is Appropriate Here

Certiorari prior to judgment in the court of appeals would, in the circumstances presented here, accord fully with the Court's actions in previous similar situations. When in the past the Court has granted review of a case presenting only one aspect of a controversy, or when litigation is pending in the lower courts that is closely related to a case already under review, the Court has granted certiorari prior to judgment in the courts of appeals in order to avoid duplicative litigation and to consolidate interrelated cases for review at the same time.

For example, in the *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970), the Court granted certiorari prior to judgment in order to bring before it a case involving issues of valuation similar to issues already pending before the Court. Similar steps have been taken in analogous situations to consolidate interrelated questions of statutory construction. *E.g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963) (National Labor Relations Act); *Porter* v. *Dicken*, 328 U.S. 252, 253 (1946) (Emergency Price Control Act); *Johnson* v. *United States Ship-*

ping Board Emergency Fleet Corp., 280 U.S. 320, 324-25 (1930) (Suits in Admiralty Act).

This is plainly an appropriate occasion for certiorari prior to judgment. *SmithKline* and *Bristol* are parts of the same controversy, arising from identical demands made by GAO at the same time, for the same purposes and upon the basis of the same statutory and contractual provisions. The resolution of both cases will turn upon consideration of the same congressional purpose, reflected in the same legislative history. The cases differ only in that *Bristol* presents for decision one aspect of the more comprehensive questions presented in *SmithKline*. This difference arises, not from factual variations in the two cases, but only from Bristol's election voluntarily to accede to portions of the Comptroller General's demands.

As we have observed above, review of *Bristol* alone will not in any respect expedite or simplify the resolution of this controversy. To the contrary, isolation of the issue presented in *Bristol* will invite repetitive proceedings in this Court and needlessly burden two courts of appeals. Strong considerations of economy and efficiency make clear that, if review is granted of *Bristol*, it should also be granted here.[27]

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[27] The filing of a brief *amicus curiae* by SmithKline in *Bristol* could not achieve the same efficiencies. Even if such a brief were filed, the Court would be unable to resolve the more comprehensive issues presented in *SmithKline*, the Third Circuit would still be compelled to continue its review of the case, and one or another of the parties could still seek a writ of certiorari to the Third Circuit, in which review could be sought of the issues not presented in *Bristol*.

CONCLUSION

The petition for a writ of certiorari in No. 80-264 should be denied. If review is denied there, this petition should be denied. If, however, review were to be granted in No. 80-264, this petition should also be granted.

Respectfully submitted,

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September 18, 1980

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT, E.D. PENNSYLVANIA

Civ. A. No. 75-499

SMITHKLINE CORPORATION, *Plaintiff*,

v.

Elmer B. STAATS, Comptroller General of the United States, *Defendant*,

and

THE UNITED STATES OF AMERICA, *Intervenor-Defendant*.

January 24, 1980

William S. Rawls, Philadelphia, Pa., for plaintiff.

Peter F. Vaira, U. S. Atty., Philadelphia, Pa., for defendant.

J. Roger Edgar, Dept. of Justice, Civil Division, Washington, D. C., for intervenor-defendant.

Memorandum

RAYMOND J. BRODERICK, District Judge.

This action arises from a demand asserted by the General Accounting Office ("GAO") for access to books and records maintained by the plaintiff SmithKline Corporation ("SmithKline"). Plaintiff filed a complaint seeking declaratory and injunctive relief to bar GAO from access to the documents. The Court granted the motion of the United States to intervene as a party defendant for the purpose of asserting a counterclaim seeking declaratory and injunctive relief to compel SmithKline to comply with

GAO's demand for documents. Now before the Court are plaintiff's motion for summary judgment and the government's motion for summary judgment on its counterclaim. For the reasons hereinafter set forth, the Court will grant the government's motion for summary judgment on its counterclaim and deny the plaintiff's motion for summary judgment.

In determining the propriety of granting a motion for summary judgment, the Court must consider whether there exists a genuine issue as to any material fact. *Hicks v. ABT Associates, Inc.*, 572 F.2d 960, 967 (3d Cir. 1978); *Abdallah v. Caribbean Security Agency*, 557 F.2d 61, 63 (3d Cir. 1977); *Scott v. Plante*, 532 F.2d 939, 945 (3d Cir. 1976). On the basis of uncontroverted depositions and affidavits filed by the parties in connection with the motions for summary judgment, the Court finds that there is no genuine issue of material fact. The uncontroverted record may be summarized as follows:

The Veterans Administration ("VA") and Defense Supply Agency ("DSA") awarded certain negotiated fixed-price contracts for pharmaceutical products to SmithKline, and, in one instance, to SK&F Co., its wholly owned subsidiary. Those contracts are summarized as follows:

Veterans Administration

Contract Number	Date of Award	Contract Price	Final Payment Made
V797P-5835b	7/31/73	Est. $1,599,042.50	—
V797P-5892b	10/2/73	$ 137,148.00	—
Defense Supply Agency			
DSA120-74-C-0519	8/1/73	$ 105,431.74	12/26/73
DSA120-73-D-2968	4/16/73	$1,436,510.30	8/22/74
DSA120-74-C-2518	3/6/74	$ 12,058.20	8/13/74

Pursuant to 41 U.S.C. § 254(c),[1] the contracts with the VA incorporated the following clause:

Examination Of Records By Comptroller General

(a) This clause is applicable if the amount of this contract exceeds $2,500 and was entered into by means of negotiations, including small business restricted advertising, but is not applicable if this contract was entered into by means of formal advertising.

(b) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this contract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records, of the contractor involving transactions related to this contract.

(c) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under the subcontract or

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[1] 41 U.S.C. § 254(c) provides:

(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. . . .

such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulation Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (1) purchase orders not exceeding $2,500 and (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(d) The periods of access and examination described in (b) and (c), above, for records which relate to (1) appeals under the "Disputes' clause of this contract, (2) litigation or the settlement of claims arising out of the performance of this contract, (3) costs and expenses of this contract, as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall continue until such appeals, litigation, claims or exceptions have been disposed of.

The same clause was included in the Defense Supply Agency contracts, pursuant to 10 U.S.C. § 2313(b), which provides:

(b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

On January 19, 1971, Comptroller General Elmer B. Staats and other GAO representatives appeared before

the Subcommittee on Monopoly of the Senate Select Committee on Small Business at hearings concerning the status of competition in the pharmaceutical industry. Mr. Paul Shnitzer of the GAO General Counsel's Office testified that

> . . . there is a statute which was enacted in 1951 which says in effect that any negotiated contract awarded pursuant to either the Federal Property Act or the Armed Services Procurement Act, which would cover the two major acts, has to contain a provision which gives the General Accounting Office access to the books, documents, papers and records of the contractor or his subcontractors which relate to the contract.[2]

Mr. Gregory Ahart, Deputy Director of GAO's Civil Division, testified that

> . . . we are continuing our work in examining drug procurement systems and as part of that work we will be giving consideration to utilizing the authority which we have under the provision of the 1951 act which Mr. Shnitzer mentioned, and actually examine the costs of certain of the drug manufacturers.
>
> We have not decided how far we are going to go on this and the final plans are indefinite, but this will be given consideration as part of this continuing work and I am sure some of it will be done.[3]

Senator Gaylord Nelson then stated:

> I realize it may be a very complicated matter, but it would seem to me that all companies ought to be served notice and the GAO is going to utilize this

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[2] Subcommittee on Monopoly of the Senate Select Committee on Small Business, Hearings on Competitive Problems in the Drug Industry, January 19, 1971, at 8018.

[3] *Id.* at 8020.

statute. I think that we ought to take a look at some of those costs.[4]

After the hearings, Senator Nelson and his staff pursued their efforts to have GAO obtain documents from the pharmaceutical companies. On August 9, 1971, the Comptroller General asked Senator Nelson and his staff assistant, Ben Gordon, if their objectives would be served by composite, industry-wide cost data that would be representative of several companies and products, but not identifiable as to any particular company or product. Gordon responded that they preferred individual product and company data, which "should be made public."[5] Gordon continued to press GAO to obtain documentation of costs from the pharmaceutical companies. (Ahart Dep., Exhibits PA-14 through PA-22). Gordon demanded on behalf of Senator Nelson that GAO seek data "through the courts, if necessary." (*Id.*, Exhibits PA-16, PA-17). Gordon told GAO that Senator Nelson believed that GAO should seek data "without any strings attached" so that the information "could be used as needed." (*Id.*, Exhibit PA-19). A staff assistant to Senator Edward Kennedy told GAO that individual company and product data were essential, since the "only way" that Senator Kennedy's objectives could be achieved was to "publicize specific price and cost data for individual products." (*Id.*, Exhibit PA-27).

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[4] *Id.*

[5] Deposition of Gregory J. Ahart, Director GAO Human Resources Division, October 19, 1976 (hereinafter "Ahart Dep."), Exhibit PA-15. Mr. Ahart's deposition was taken in the case of *Merck & Co. v. Staats*, No. 74-1447 (D.D.C.), but the parties stipulated that the deposition transcript may be used in this action as if the deposition had been taken in this case. Exhibits to the deposition are referred to as "Exhibit PA", with an identifying number. Copies of the exhibits and deposition transcript have been filed of record.

As a result of these communications, GAO eventually concluded that ". . . there is no viable alternative than to press the companies for access to their cost data." (*Id.*, Exhibit PA -18).

Subsequent to a second appearance by the Comptroller General before Senator Nelson's Subcommittee on May 10, 1972, GAO began to implement a two-phase study of the economics and operations of the pharmaceutical industry. As a first step, GAO representatives met with representatives of the Pharmaceutical Manufacturers Association and its member firms.[6] The first phase of the study consisted of two or three day visits to the facilities of six drug manufacturers, including SmithKline. Phase I of the study, in which the drug manufacturers voluntarily agreed to participate, was "designed to obtain for GAO an understanding of the drug manufacturing industry and to enable GAO to develop a meaningful approach for the second phase of the study." (Ahart Aff. I ¶ 6).

Following the Phase I visits, GAO prepared a proposed plan for a detailed study (Phase II). The objective of this study was "to gather and develop data necessary for GAO to present a comprehensive and objective presentation to the Congress and the involved Federal agencies concerning the salient economic and operational aspects of the drug industry." (Ahart Aff. I ¶ 8). It was proposed that GAO request that major drug manufacturers provide data for the years 1964 through 1973 relating to sales, manufacturing cost, research and development expenditures, general and administrative expenses, marketing costs, distribution costs, capital investment, and all other costs associated with the pharmaceutical business. (Ahart Dep., Exhibit PA-10). Senators Kennedy and Nelson continued to insist that the study provide cost data specific to individual

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[6] Affidavit of Gregory J. Ahart, July 8, 1975 (hereinafter "Ahart Aff. I") ¶ 5.

products and companies. (Ahart Dep. Exhibits PA-27, PA-29).

Beginning in March, 1974, GAO held discussions with the six pharmaceutical firms concerning their willingness to participate in the Phase II plan. By June, 1974, it became clear that the firms would not voluntarily permit access to the data sought by GAO. (Ahart Aff. I ¶ 9). GAO therefore dropped its plans for the voluntary Phase II study and decided upon "a more modest study" which would be based on data obtained through access-to-record provisions in negotiated government contracts with drug companies. (*Id.* ¶ 10). GAO has described the purpose of this study as follows:

> GAO intends to use data obtained through the access-to-records clause contained in the specified contracts in a proposed review to determine the basis for the prices charged by the suppliers of the products procured by the Government under the specified contracts. In undertaking this review GAO intends to: (1) identity and verify the direct costs involved in the manufacture and distribution of these particular products (2) identify the makeup and amounts of indirect costs involved in the development, manufacture, distribution, and marketing of these products and (3) review other pertinent considerations taken into account by the suppliers in pricing these products.

(Ahart Aff. I ¶ 11).

On August 26, 1974, the Comptroller General wrote to the President of SmithKline:

> As you know, because of the increasing Federal involvement in the procurement of pharmaceuticals, the General Accounting Office has underway a review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and

pharmaceuticals procured under negotiated contracts. This examination is being conducted at several drug companies, including SmithKline Corporation, and is being made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. § 53), the Accounting and Auditing Act of 1950 (31 U.S.C. § 67), and the authority of the Comptroller General to examine contractors' records under the contract provisions pursuant to 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c).

. . . . .

The purpose of this letter is to formally request that cost records pertinent to contracts listed on enclosure 1 be made available for our examination as provided by the terms of the negotiated contracts awarded to your company by the Defense Supply Agency and the Veterans Administration. We must request that you have the responsible officials at SmithKline Corporation make available to the General Accounting Office as required, all books, documents, papers, and other records directly pertinent to the contracts, *which include, but are not limited* to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests. For your information, statements from the legislative history pertaining to the "Examination of Records" clause included in the contracts and our position on the duties and responsibilities that the clause imposes upon my Office are presented in enclosure 2.

SmithKline refused to comply with this formal request for records, and filed its complaint seeking declaratory and injunctive relief on February 20, 1975.

SmithKline does not question the government's authority, pursuant to 41 U.S.C. § 254(c) and 10 U.S.C. § 2313(b), to include in its negotiated contracts provisions concerning "access-to-records." Furthermore, SmithKline concedes that it voluntarily executed the contracts at issue in this case with full knowledge of the access-to-records provisions contained in each contract. SmithKline argues, however, that it should not be required to disclose the information demanded by the GAO in this case because the record before the Court supports the conclusion that GAO is seeking the information for an improper purpose. This improper purpose, SmithKline contends, is that the GAO is seeking information concerning profits in the pharmaceutical industry for dissemination to Congress and the public. If the Court does not accept this contention and grants summary judgment for plaintiff, SmithKline then argues that summary judgment must be denied because the question of GAO's purpose constitutes a genuine issue of material fact. Finally, SmithKline argues that, even if this Court should conclude that GAO's purpose is proper, the information demanded in this case is beyond the scope of the access-to-records provisions of the contracts and the statutes. The government, on the other hand, argues that the provisions in the contracts and the statutes entitle the GAO to examine all records directly related to the costs of production of the drugs which the government has contracted to purchase. The government further argues that the uncontroverted factual record before the Court establishes that the purpose underlying its demand for records is proper.

Identical demands by GAO for the cost records of other drug companies have resulted in litigation in other circuits. In *Bristol Laboratories v. Staats*, 428 F.Supp. 1388 (S.D.N.Y.1977), the Court entered an order granting summary judgment for the plaintiff and requiring the production of only those documents the plaintiff agreed to provide,

i. e., those related to direct manufacturing costs but not costs incurred in research and development, marketing and promotion, or distribution and administration. The Court in *Merck & Co. v. Staats,* No. 74-1447 (D.D.C.1977), adopted the order entered by the *Bristol* court. The Seventh Circuit has interpreted the access-to-records clauses to require broad access to cost records, including costs of research and development, whether or not pharmaceutical companies allocate such costs directly to the contracts. *Eli Lilly & Co. v. Staats,* 574 F.2d 904 (7th Cir.), *cert. denied,* 439 U.S. 959, 99 S.Ct. 362, 58 L.Ed.2d 351 (1978); *United States v. Abbott Labs,* 597 F.2d 672 (7th Cir. 1979). Hoffman-LaRoche, another drug company from which the GAO sought similar information, settled without litigation. *The Comptroller General's Authority to Examine the Private Business Records of Government Contractors,* 92 *Harv.L. Rev.* 1148, 1150 (1979). The delay in ruling on these cross-motions for summary judgment has been due, to considerable extent, to the agreement of the parties to await the outcome of litigation in other circuits.

We will deal first with SmithKline's contention that the question of the purpose for GAO's demand for records is a genuine issue of material fact. The standard for granting a motion for summary judgment is well established. *See Hicks v. Abt Assoc., Inc., supra* 572 F.2d at 967. We are mindful of our responsibility to resolve in favor of the non-moving party any doubt concerning whether there is a genuine issue of material fact. This court's examination of the depositions and affidavits submitted by the parties clearly shows that the government has met its burden of demonstrating that there are no genuine issues of material fact.

The government has submitted the deposition and affidavits, accompanied by voluminous exhibits, of Gregory J. Ahart, a senior GAO official. The only factual material that SmithKline has placed before the Court is the affidavit

of Kenneth A. Bower, its Vice President for Administration and Finance. Mr. Bower's affidavit raises the issue of confidentiality, which has been resolved by the protective order agreed upon by the parties. The Bower affidavit also sets forth SmithKline's interpretation of the term "directly pertinent" as it is used in the access-to-records statutes. Mr. Bower's affidavit does not address the issue of the government's purpose for seeking SmithKline's records. Thus, the Ahart deposition and affidavits are uncontroverted in this regard. A party opposing summary judgment on the ground that there exists a genuine issue of material fact must respond to an affidavit with more than a general denial. *Lockhart v. Hoenstine*, 411 F.2d 455, 459 (3d Cir. 1969). The Court should not assume the existence of a factual issue where none exists. *Id.* In this case SmithKline attempts to characterize a legal issue as a factual one precluding summary judgment for the government. The question before the Court, however, is not "What was GAO's purpose in seeking information from SmithKline?". The uncontroverted factual record before the Court establishes that GAO's purpose is to compare cost to price of drugs purchased under specified contracts to determine the adequacy of the protections afforded the government in the contract negotiation process (Ahart Aff. I ¶ 11, discussed in detail, *infra*). Whether or not this purpose is authorized by the access-to-records statutes is a question of law upon which summary judgment is clearly appropriate. *Evans v. S. S. Kresge Co.*, 394 F.Supp. 817 (W.D. Pa.1975), *aff'd*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977).

SmithKline has agreed that "The relevant facts and issues here are identical to those in *Lilly* . . ." (Memorandum in Support of SmithKline's Cross-Motion for Summary Judgment), and has agreed to use discovery from previous cases. (*See* n. 5, *supra*.) Therefore, the denial of summary judgment in this already protracted and somewhat duplicative litigation would hardly further the policy

of Rule 56 to "eliminate a trial in cases where it is unnecessary and would only cause delay and expense." *Anthony v. Ryder Truck Lines, Inc.*, No. 79-1539, Slip op. at 7, 611 F.2d 944 at 947 (3d Cir. 1979), *quoting Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976).

In determining whether the GAO's purpose in this case was authorized by the statutes, we must look to the source of the GAO's power to examine contractors' records. While the status of the GAO, as an agency of Congress, is not identical to that of administrative agencies of the executive branch, *see The Comptroller General's Authority to Examine the Private Business Records of Government Contractors*, 92 *Harv.L.Rev.* 1148 (1979), we find Professor Davis' principle of administrative law to be equally applicable to the issue of GAO's authority. That is, an agency's power to investigate can be exercised only for the purpose for which the authority was granted. 1 K. Davis, *Administrative Law* § 3.10. *See also Burlington Northern, Inc. v. Interstate Commerce Comm'n*, 149 U.S.App.D.C. 176, 462 F.2d 280 (D.C. Cir.), *cert. denied*, 409 U.S. 891, 93 S.Ct. 120, 34 L.Ed.2d 148 (1972); *Chattanooga Pharmaceutical Ass'n v. United States Dept. of Justice*, 358 F.2d 864 (6th Cir. 1966); *Shasta Minerals & Chemical Co. v. Securities & Exchange Comm'n*, 328 F.2d 285 (10th Cir. 1964); *Montship Lines, Ltd. v. Federal Maritime Board*, 111 U.S.App.D.C. 160, 295 F.2d 147 (D.C. Cir. 1961).

In determining for what purpose the GAO was granted authority to review business records of private businesses that contract with the government, we look first to the history of the access-to-records statutes. Congress in 1951 amended the Armed Services Procurement Act of 1949 and the Federal Property and Administrative Services Act of 1949 to require the inclusion in government contracts that are "negotiated without advertising" of provisions authorizing the Comptroller to audit and examine materials "directly pertinent" to the contracts. The remarks

of Representative Hardy, the sponsor of the amendment, make it clear that its purpose was to enable the GAO to determine whether suppliers of war materials under contracts let without competitive bidding were reaping excessive profits:

> In normal times, competitive bidding generally operates as a brake on the price which a contractor can demand from the Government for his goods and services. However, these are not normal times, and it should be obvious to all of us concerned with the expenditure of billions of dollars for national defense that we must establish every reasonable safeguard against waste and extravagance in the spending of these vast sums. Under conditions as they now exist, competitive bidding has little or no effect upon contracts which are negotiated without advertising. As a result, when a contract is being negotiated, here is a typical illustration of what usually happens: A contractor with years of experience comes to the conference table accompanied by an equally competent lawyer. The Government representative on the other side of the table will, in a great majority of cases, be at a tremendous disadvantage from the standpoint of both training and experience, no matter how conscientious and honest he may be. So, aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal. The bill would at least enable the agent of the Congress to check the transaction both from the Government records and the contractors' books.
>
> The major purposes of the bill are twofold: One, to give the Comptroller General the proper tools to do the job the Congress has instructed him to do; and, two, to provide a deterrent to improprieties and wastefulness in the negotiation of contracts.

97 Cong.Rec. 13198 (October 15, 1951).

Before the current cases involving the pharmaceutical industry, there was only one judicial interpretation of the access-to-records provision of 10 U.S.C. § 2313(b), *Hewlett-Packard Company v. United States*, 385 F.2d 1013 (9th Cir. 1967). The Court there permitted the government to have access to production cost information, interpreting the statutory term "contract" broadly to include the general subject matter of the contract:

> In our opinion, however, the word "contract", as used in this statute is intended to have a broader meaning, embracing not only the specific terms and conditions of the agreement but also the general subject matter. The subject matter of these four contracts is the procurement of described property by the Government.
>
> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs. Production costs involve transactions relating to the contract, because they encompass business arrangements made by the contractor in obtaining the materials, labor, facilities and the like required by it in fulfilling its commitment with reference to the subject matter of the contract. *Id.*, at 1016.

We find that it is clear from the legislative history and from the interpretation of the *Hewlett-Packard* court that the statutory access-to-records provisions permit GAO to examine cost records of negotiated contracts[1] in order to

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[1] Plaintiff argues that the access-to-records provisions do not apply to negotiated contracts when the price is based upon a catalog price, as it was in this case. We disagree. The provisions, by their terms, apply to negotiated contracts without qualification. Moreover, the contract price in *Hewlett-Packard* was based upon listed catalog prices. 385 F.2d at 1014.

determine whether, as set forth in the legislative history, there have been "improprieties and wastefulness in the negotiation of contracts," or whether, as stated in *Hewlett-Packard*, the contractor's costs are "out of line with the contract price."

The uncontroverted factual record placed before the Court establishes that GAO seeks SmithKline's records for the cost-price comparison authorized by the statutes. The Court should look to the agency's own assertions of its reasons for seeking the information. *S.E.C. v. Chenery Corp.*, 322 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *see also C.A.B. v. United Airlines, Inc.*, 542 F.2d 395, 402 (7th Cir. 1976). While the circumstances leading up to GAO's demand for access to SmithKline's records might suggest that GAO was seeking to gather information for an industry study for the enlightenment of Congress and the public, GAO's statements demonstrate that its purpose was to review the pricing of drugs supplied under specific government contracts. The Comptroller General's letter to SmithKline, quoted at length at p. 8, above, refers to a "review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts," and "information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests." The uncontradicted affidavit of Gregory Ahart further establishes that GAO seeks access to SmithKline's records for the purpose of reviewing pricing of drugs purchased by the government. Mr. Ahart stated: "GAO intends to use data obtained through the access-to-records clause contained in the specified contracts in a proposed review to determine the basis for the prices charged by the suppliers of the products procured by the Government under the specified contracts. . . ." (Ahart Aff. I ¶ 11). He further stated: "It is my opinion that the data . . . is necessary to review contract pricing by the Government's

suppliers of drug items in order to determine the adequacy of the protection afforded the Government by the negotiation techniques used by the procuring agencies." (*Id.* ¶ 12). While the government has stipulated [8] that it suspects no impropriety in pricing in connection with the specific contracts, nothing in the access-to-records statutes suggests that the GAO must suspect impropriety before it exercises its authority to review a contractor's records. We therefore conclude that GAO's demand for SmithKline's cost records was made for a purpose authorized by the statutes. Thus, on the basis of the record before this Court, it is not necessary for us to determine, as did the Seventh Circuit in *Eli Lilly, supra* that an industry-wide public information study is an authorized purpose for a GAO inquiry. *See* 574 F.2d at 910-12.

Having determined that the undisputed facts in this record show that the GAO's purpose was authorized by the statutes, we must now determine the permissible scope of GAO's access to SmithKline's records.

The government argues that its right of access extends to records of all costs which in some way affected the price of the drugs purchased under the contracts which are at issue. Specifically, the government demands access to records of materials, labor, overhead, distribution, research and development, and marketing costs, whether or not SmithKline's accounting system apportions these costs to individual drug products or contracts. SmithKline argues that such broad access is not authorized by the statutes, nor was it within the contemplation of the parties at the time the contract was signed.

The *Hewlett-Packard* case, *supra*, which held that the access-to-records statutes permitted the GAO to inspect

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[8] "GAO has no reason to believe that SmithKline made unreasonable or excessive profits with respect to the contracts which form the subject matter of this action." (Stipulation of the parties filed March 14, 1977).

all of a contractor's records of production costs of the item purchased under the contract, was decided well before any of the contracts here at issue was signed. While *Hewlett-Packard* did not define the meaning of "production costs" directly pertinent to the contract, the Seventh Circuit in *Eli Lilly* made it clear that, under the access-to-records statutes, the government is not limited in its inspection to the direct costs of manufacturing the drug covered by the contract. Such a limitation, in the drug industry, would defeat the purpose of the access-to-records statutes since, as the Court in *Eli Lilly* pointed out, manufacturing and distribution costs of drugs have been estimated to constitute as little as nine percent of the product's sale price. *See* T. Donald Rucker, *Public Policy Considerations and the Pricing of Prescription Drugs in the United States*, 4 International Journal of Health Services, No. 1, 1974, pp. 173, 174. We agree with Eli Lilly's reasoning that "the access-to-records clauses should be interpreted so that an item is 'directly pertinent' to a contract if it is a significant input in the price of the product purchased in the contract." 574 F.2d at 914-915. This Court concludes therefore that the access-to-records statutes, and the contract clauses based thereon, clearly permit the GAO to inspect the records of costs of materials, labor, overhead, distribution, research and development, and marketing and such other costs as are directly pertinent to the drugs for which the government contracted. Interpreting the access-to-records statutes in light of their purpose to permit a determination as to whether costs are "out of line with the contract price," it is clear that the GAO is entitled to inspect the records of all costs which go into the makeup of the price of the drug covered in the contract.

The Court will therefore order SmithKline to permit the GAO to inspect records of costs of material, labor, overhead, distribution, research and development and marketing and such other costs as are directly pertinent to the drugs purchased under the specified contracts. The Court

will include in its Order provisions concerning the confidentiality of records, as agreed by the parties.

Order

AND NOW, this 24th day of January, 1980, the Court, having considered the parties' cross-motions for summary judgment, having held a hearing thereon, for the reasons set forth in the Memorandum of this Court dated January 24, 1980, hereby ORDERS that plaintiff's motion for summary judgment is DENIED and defendant-intervenor's motion for summary judgment on its counterclaim is GRANTED as follows:

It is FURTHER ORDERED that the Comptroller General of the United States and his duly authorized representatives have the right to examine all books, documents, papers, or records directly relating to the pricing and cost of producing items furnished and cost of producing items furnished by plaintiff SmithKline under the following contracts numbered: V797P-5835(b), V797P-5892(b), DSA120-74-C-2519, DSA120-74-C-2518 and DSA 120-73-D-2968, including, but not limited to, records of experienced costs, including costs of materials, labor, overhead, distribution, research and development, and marketing, and such other costs as are directly pertinent to the drugs covered in the enumerated contracts;

It is FURTHER ORDERED that the plaintiff, SmithKline, its officers, agent, servants, attorneys, employees and all persons in active concert or participation with them who receive actual notice of an order by personal service or otherwise, are enjoined from preventing the duly authorized representatives of the Comptroller General of the United States from obtaining access to and examining such books, documents, papers, or records of the plaintiff that this Court has ordered the Comptroller General and his duly authorized representatives have the right to examine; and plaintiff SmithKline, including its officers and subordinates, are directed to have available on the premises

of SmithKline, and its other principal offices wherever located, such books and records upon reasonable notice by the Comptroller General or his authorized representatives;

It is FURTHER ORDERED that every book, report, papers, record, and other documents (all hereinafter referred to as "documents"), designated as confidential by SmithKline or any of its divisions or subsidiaries and provided or otherwise made available to the Comptroller General or any of his successors, agents, employees, or subordinates (all hereinafter referred to as "the Comptroller General"), and every summary thereof and extract therefrom, and all data and information contained therein, including accountants' work papers (all hereinafter referred to as "data"), shall be held in confidence and shall not be provided or otherwise made available by the Comptroller General to any person or agency outside the General Accounting Office except as provided in subparagraphs (a), (b), and (c), below. No copies of SmithKline's documents shall be included in accountants' work papers without the approval of SmithKline.

Any document and data referred to in the above paragraph shall be used by the Comptroller General solely for the purpose of a contract study. Upon completion of that study, the Comptroller General shall immediately return to SmithKline all documents described in that paragraph. Any data in which SmithKline, any of its divisions or subsidiaries, or any product manufactured or sold by any of them are or may be directly or indirectly identified which the Comptroller General deems it necessary to retain shall be retained by the General Accounting Office and deposited with and maintained by the Comptroller General under security measures to be agreed upon by the parties. Access to such data by any person shall be permitted only upon written authorization of the Comptroller General, and as limited in the subparagraphs following next denominated a, b, and c.

(a) Any of the data referred to in the above paragraphs may be published, provided to, or otherwise made available to a person or agency outside the General Accounting Office if the data are published, provided, or made available in such a way that any direct or indirect identification of SmithKline, any of its divisions or subsidiaries or any product manufactured or sold by any of them, is not reasonably possible. SmithKline shall be afforded a reasonable opportunity to examine and offer its comments regarding any data considered for release, including any report issued by the Comptroller General that includes such data, before release of the data or report.

(b) The Comptroller General may comply without regard to the limitations of this Order set forth above, with an official written request for any of the data referred to above submitted to him by either House of Congress, or any committee of the House of Representatives or the Senate, or any joint committee of the two Houses, having jurisdiction over the subject matter of the study referred to in the Affidavit of Gregory J. Ahart filed in this section, to the extent authorized and directed by law. The Comptroller General will cause prompt notice of any such request to be given to SmithKline and to this Court at least seven (7) calendar days prior to furnishing the data requested.

(c) The Comptroller General and the United States shall notify SmithKline promptly of any request for disclosure, subpoena *duces tecum*, civil action, or other order or application for an order seeking production, release, or disclosure of any data referred to above, and further agree to use their best efforts to protect the confidentiality of such data, except as provided above, including resort to appropriate judicial remedies and cooperation with SmithKline in such efforts.

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-499

SMITHKLINE CORPORATION,
Plaintiff,

v.

ELMER B. STAATS,
Defendant,

and

UNITED STATES OF AMERICA,
Intervenor-Defendant.

Notice Of Appeal

Plaintiff-appellant SmithKline Corporation hereby gives notice that it appeals to the United States Court of Appeals for the Third Circuit from the memorandum opinion, order and judgment of this Court entered in the above-captioned proceeding on the 24th day of January, 1980, in which the Court granted the motion for summary judgment of the intervenor-defendant, denied the motion for summary judgment of the plaintiff-appellant, and entered an order and judgment.

/s/ WILLIAM S. RAWLS
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SmithKline Corporation

APPENDIX C

APPENDIX C

Section 4 of the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. § 2313(b), reads in full:

> "Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract."

Section 304 of the Federal Property and Administrative Services Act, as amended, 41 U.S.C. § 254(c), reads in full:

> "All contracts negotiated without advertising pursuant to authority contained in this chapter, chapter 11C of Title 5, chapter 10 of Title 40, and chapter 11 of Title 44 shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

Supreme Court, U.S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

No. 80-434

In the Supreme Court of the United States

OCTOBER TERM, 1980

SMITHKLINE CORPORATION, PETITIONER

v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, AND UNITED STATES OF AMERICA

ON CONDITIONAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ON CONDITIONAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Comptroller General's request for access to petitioner's records pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) was invalid because of the purpose underlying the request.

2. Whether, with respect to a negotiated government contract in which a fixed price was set on the basis of the commercial market price and without reference to incurred costs, the Comptroller General is authorized by 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) to examine the contractor's records of its costs, including its unallocated costs, where government payments under the contract are used to defray those costs.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 20

TABLE OF AUTHORITIES

Cases:

Bristol Laboratories v. *Staats*, 620 F. 2d 17, petition for cert. pending, No. 80-264 (filed Aug. 21, 1980) 5, 6

Eli Lilly & Co. v. *Staats*, 574 F. 2d 904, cert. denied, 439 U.S. 959 ..... 4, 6, 10, 11, 14, 16, 18

Greene v. *McElroy*, 360 U.S. 474 19

Hannah v. *Larche*, 363 U.S. 420 19

Hewlett-Packard Co. v. *United States*, 385 F. 2d 1013, cert. denied, 390 U.S. 988 ..... 3-4, 10, 13, 16

Johnson v. *Fleet Corp.*, 280 U.S. 320 19

McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 19

Merck & Co. v. *Staats*, Civil Action No. 74-1447 (D.D.C. Aug. 12, 1977), appeals pending, Nos. 79-1435, 79-1438 (D.C. Cir., argued Feb. 11, 1980), conditional petition for cert. before judgment pending, No. 80-416 (filed Sept. 16, 1980) 6, 10, 11, 16

Page

Cases—Continued:

Mt. Healthy City Board of Ed. v. *Doyle*, 429 U.S. 274 12

New Haven Inclusion Cases, 399 U.S. 392 19

Porter v. *Dicken*, 328 U.S. 252 19

Porter v. *Lee*, 328 U.S. 246 19

Taylor v. *McElroy*, 360 U.S. 709 19

United States v. *Abbott Laboratories*, 597 F. 2d 672 ..... 6, 11

United States v. *LaSalle National Bank*, 437 U.S. 298 12

United States v. *Nixon*, 418 U.S. 683 17

Washington v. *Fishing Vessel Assn.*, 443 U.S. 658 19

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 17

Statutes and rule:

10 U.S.C. 2313(b) 1

41 U.S.C. 254(c) 1

Sup. Ct. R. 18 ..... 7, 17

Miscellaneous:

97 Cong. Rec. (1951):

p. 13198 8

p. 13199 8

p. 13376 8

Page

Miscellaneous—Continued:

p. 13377 8

115 Cong. Rec. 25801 (1969) 15

Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts Before the Subcomm. on Military Operations of the House Comm. on Government Operations, 89th Cong., 1st Sess. (1965) 9, 15

Hearings on Relation of Cost Data to Military Procurement Before the Subcomm. for Special Investigations of the House Comm. on Armed Services, 88th Cong., 1st Sess. (1963) 14, 15

H.R. Rep. No. 791, 82d Cong., 1st Sess. (1951) 8, 9

S. Rep. No. 603, 82d Cong., 1st Sess. (1951) 8, 9

OPINION BELOW

The opinion of the district court (Pet. App. 1a-21a) is reported at 483 F. Supp. 712.

JURISDICTION

The judgment of the district court, dated January 24, 1980 (Pet. App. 1a), was entered on January 25, 1980 (C.A. App. 4).[1] On March 19, 1980 (C.A. App. 5), petitioner filed a notice of appeal (Pet. App. 1b) to the United States Court of Appeals for the Third Circuit, and the case is still pending in that court (No. 80-1464). The conditional petition for a writ of certiorari before judgment was filed on September 18, 1980. The jurisdiction of this Court to review the case by writ of certiorari before final judgment of the court of appeals is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATEMENT

1. In 1973 and 1974, petitioner entered into three contracts with the Defense Supply Agency of the Department of Defense and two contracts with the Veterans Administration for the sale of pharmaceutical products to the government. Each of the five contracts was a negotiated fixed-price contract in which the price was based on petitioner's published catalogue price for the particular product; the total price for the contracts was approximately $3.3 million (Pet. App. 2a, 15a n.7; C.A. App. 47-51). As required by 10 U.S.C. 2313(b)[2] and 41 U.S.C. 254(c),[3] each of the contracts contained a standard

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[1] "C.A. App." refers to the joint appendix filed by the parties in the court of appeals.

[2] This provision is applicable to the Defense Supply Agency contracts.

[3] This provision is applicable to the Veterans Administration contracts.

access-to-records clause in which petitioner agreed that the "Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract * * * , have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract" (Pet. App. 3a-4a; C.A. App. 48-53).

In May 1972, the General Accounting Office began "a two-phase study of the economics and operations of the pharmaceutical industry" (Pet. App. 7a). In the first phase of the study, petitioner and five other pharmaceutical firms agreed to permit GAO officials to visit and inspect their facilities and operations. The companies declined, however, to participate in the second phase of the study, which was designed to enable GAO to examine "the salient economic and operational aspects of the drug industry" (*ibid.*). Because of the companies' failure to cooperate, GAO abandoned its plans for the second phase of the study and proposed "a more modest study" based on data to be obtained under the foregoing access-to-records provisions (*id.* at 8a).

In August 1974, the Comptroller General wrote to the six companies, including petitioner, to request access to designated records pursuant to the access-to-records provisions. The Comptroller General explained that the request was part of "a review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts" (Pet. App. 8a-9a). To that end, the Comptroller General sought to examine

> all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs

> including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests.

Pet. App. 9a; C.A. App. 61.

2. Petitioner refused to comply with the Comptroller General's request. Instead, on February 20, 1975, it commenced the present action in the United States District Court for the Eastern District of Pennsylvania seeking declaratory and injunctive relief to bar GAO from access to its records. The United States subsequently intervened as a defendant and filed a counterclaim to require petitioner to allow the requested inspection (Pet. App. 1a-2a, 9a).

Following discovery, the district court on January 24, 1980, granted the government's motion for summary judgment and denied petitioner's cross-motion (Pet. App. 1a-21a). Contrary to petitioner's contention that the Comptroller General's request had been prompted by the assertedly improper purpose of "seeking information concerning profits in the pharmaceutical industry for dissemination to Congress and the public" (*id.* at 10a), the court found, "[o]n the basis of uncontroverted depositions and affidavits filed by the parties in connection with the motions for summary judgment" (*id.* at 2a), "that GAO's purpose is to compare cost to price of drugs purchased under specified contracts to determine the adequacy of the protections afforded the government in the contract negotiation process" (*id.* at 12a). Relying on the legislative history of the access-to-records statutes and the decision in *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013

(9th Cir. 1967), cert. denied, 390 U.S. 988 (1968), the court also concluded that the statutes were intended to enable GAO "to determine whether * * * there have been 'improprieties and wastefulness in the negotiation of contracts,' or whether * * * the contractor's costs are 'out of line with the contract price' " (Pet. App. 15a-16a). Accordingly, the court held that the Comptroller General's purpose "to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests" (*id.* at 16a) was "a purpose authorized by the statutes" (*id.* at 17a).

In addition, in view of the plain meaning of the statutes and the *Hewlett-Packard* decision, the court rejected petitioner's argument that the access-to-records provisions were entirely inapplicable to negotiated fixed-price contracts in which, as here, the price was based on the contractor's catalogue price (Pet. App. 15a n.7).

Finally, in accordance with *Hewlett-Packard* and *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904 (7th Cir.), cert. denied, 439 U.S. 959 (1978), the court held that, at least with respect to the pharmaceutical industry, the access provisions are not limited to records of "the direct costs of manufacturing the drug covered by the contract" but include "the records of all costs which go into the makeup of the price of the drug covered in the contract" (Pet. App. 18a). The court recognized that the direct-cost "limitation, in the drug industry, would defeat the purpose of the access-to-records statutes since, as the [c]ourt in *Eli Lilly* pointed out, manufacturing and distribution costs of drugs have been estimated to constitute as little as nine percent of the product's sale price" (*ibid.*). Construing the statutes "in light of their purpose to permit a determination as to whether costs are 'out of line with the contract price' " (Pet. App. 18a, quoting *Hewlett-Packard Co.* v. *United States*, *supra*, 385

F. 2d at 1016), the court "agree[d] with Eli Lilly's reasoning that 'the access-to-records clauses should be interpreted so that an item is "directly pertinent" to a contract if it is a significant input in the price of the product purchased in the contract' " (Pet. App. 18a).

Pursuant to its opinion, the district court entered summary judgment for the government and ordered

> that the Comptroller General of the United States and his duly authorized representatives have the right to examine all books, documents, papers, or records directly relating to the pricing and cost of producing items furnished by [petitioner] under the following contracts * * *, including, but not limited to, records of experienced costs, including costs of materials, labor, overhead, distribution, research and development, and marketing, and such other costs as are directly pertinent to the drugs covered in the enumerated contracts * * *.

Pet. App. 19a. The court's order also included "provisions concerning the confidentiality of records, as agreed by the parties" (*ibid.*).

On March 19, 1980, petitioner appealed the district court's judgment to the United States Court of Appeals for the Third Circuit. That appeal is still pending; all briefs have been submitted, but oral argument has been deferred by the court of appeals until after the disposition of this petition (see order of Oct. 22, 1980).

ARGUMENT

Petitioner initially urges (Pet. 9-10, 18) that the Court deny the government's petition for a writ of certiorari in *Staats* v. *Bristol Laboratories*, No. 80-264 (filed Aug. 21, 1980), which presents a related issue concerning GAO's access to cost records of pharmaceutical companies

pursuant to the access-to-records provisions required by law. However, petitioner does not contest that there is currently a conflict in the circuits on the construction of the access statutes[4] or that a uniform interpretation of those statutes is sufficiently important to the proper administration of the federal procurement system to warrant this Court's review (see 80-264 Pet. 8-9). For the reasons stated below (see page 18, *infra*) and in the government's petition and reply memorandum in *Bristol*, we submit that the Court should decide the issue at this time and not postpone the resolution of the existing conflict.

In the alternative, petitioner contends that if the Court grants the petition in *Bristol*, it should also grant the instant conditional petition for a writ of certiorari before judgment to consider two issues that are not involved in *Bristol* and do not present a conflict in the circuits. Petitioner argues, first, that the Comptroller General's request for access was invalid because it was motivated by an improper purpose, and, second, that the access-to-records provisions are simply inapplicable and afford no access whatever in circumstances in which, as here, neither the negotiation nor the performance of the contract related to the contractor's costs.[5] As we discuss below,

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[4]Petitioner acknowledged in the court of appeals (SmithKline Br. 45) that there is a "square[] * * * conflict among the Circuits" in light of *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904 (7th Cir.), cert. denied, 439 U.S. 959 (1978), *United States* v. *Abbott Laboratories*, 597 F. 2d 672 (7th Cir. 1979), and *Bristol Laboratories* v. *Staats*, 620 F. 2d 17 (2d Cir. 1980), petition for cert. pending, No. 80-264 (filed Aug. 21, 1980). See also Pet. 10 n.19; Pet. App. 12a; Conditional Petition for Certiorari Before Judgment in *Merck & Co.* v. *Staats*, No. 80-416 (filed Sept. 16, 1980), at 9, 10.

[5]Petitioner further argues (Pet. 9, 15) that the access-to-records provisions do not encompass records of its unallocated costs notwithstanding the fact that payments by the government pursuant

however, these arguments are without merit and have been rejected by every court of appeals that has considered them. The petition thus offers no reason to expand the carefully drawn issue presented in *Bristol* to include questions that have not divided the circuits and are not otherwise deserving of this Court's review, and it falls far short of the requisite showing for certiorari before judgment "that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 18. Accordingly, the conditional petition for a writ of certiorari before judgment should be denied.

1. Petitioner asserts (Pet. 7) that the access-to-records provisions authorize the Comptroller General to inspect a contractor's records "only for narrow and specific purposes. Access was permitted to audit cost data submitted in connection with specific negotiated contracts, in order to detect fraud or overreaching * * *." Notwithstanding petitioner's assertion, however, the access provisions are not confined to discrete audits of individual contracts in order to detect fraud and overreaching.[6]

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to the contract are used to defray those costs and, as petitioner acknowledged in the court of appeals (SmithKline Br. 42-43), "unassigned costs have an impact on the price charged for the company's products, in the sense that the company's overall income must recover both the costs directly assigned and the pooled costs which have not been assigned." This is the precise question presented by the government's petition in *Bristol*. As we explain in the petition and reply memorandum in that case, petitioner's argument represents an erroneous construction of the access provisions and should be rejected by this Court. In any event, to the extent that petitioner wishes to be heard on this issue, it should seek to participate as an *amicus curiae* in *Bristol* rather than pursue the instant petition for certiorari before judgment.

[6]Unlike petitioner, Bristol has "agree[d] that it is obliged by the terms of the contracts to provide access to [certain] records" (80-264

By their terms, the access-to-records provisions contain no limitation of the sort advanced by petitioner. Rather, they apply to all government contracts negotiated pursuant to designated statutory authority. Nothing in the language of the provisions narrows their scope to unrelated audits of specific contracts or restricts their objectives to the elimination of fraud and overreaching.

The legislative history of the access-to-records statutes also refutes petitioner's interpretation. This history has been canvassed in the government's petition in *Bristol* (80-264 Pet. 10-11) and need not be repeated here. We emphasize, however, Congress's concern that "negotiated contracts * * * require close supervision and control * * * ." H.R. Rep. No. 791, 82d Cong., 1st Sess. 2 (1951); S. Rep. No. 603, 82d Cong., 1st Sess. 2 (1951). Among other things, Congress feared that "aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal." 97 Cong. Rec. 13198 (1951) (remarks of Rep. Hardy). See also *id.* at 13377 (remarks of Rep. Hoffman and Rep. Hardy). The debates contain repeated references to the need to determine whether prices in negotiated contracts were excessive, extravagant, or wasteful, and Congress "clearly understood * * * that there are a lot of other situations besides those involving fraud which might be uncovered" (*id.* at 13199 (remarks of Rep. Hardy)). For instance, as one type of "information which would be vital in a study of a contract" (*id.* at 13376), Representative Hardy offered the following illustration:

Pet. App. 8a) even though, as in the instant case, GAO had not requested the records in connection with a formal audit and had no specific grounds to believe that fraud or overreaching had occurred with respect to the contracts.

> Another vivid example of how this authority would enable the GAO to do an effective job involves a study which my Subcommittee on Government Operations has been making on pricing practices in the procurement of automotive parts. We found one situation where the Government was buying parts from an automobile dealer who, in turn, was getting them from a parts distributor who, in turn, was getting them from a small tool shop. Naturally, the price paid by the Government included profits upon profits and completely wasteful administrative and handling costs. It would be difficult, if not impossible, for GAO to detect such a situation without the right afforded in this bill.

Id. at 13198. All of these statements of congressional intent plainly extend beyond the audit of particular contracts to uncover fraud and belie petitioner's constricted construction of the access-to-records statutes.[7]

Contrary to petitioner's argument, those courts of appeals to consider the question have held that the access-

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[7]We also note the Comptroller General's statement to Congress that "any abuses discovered by the General Accounting Office in exercising the authority contained [in the bill] promptly will be brought to the attention of the proper officials, and, if warranted, to the attention of the Congress." H.R. Rep. No. 791, *supra*, at 5; S. Rep. No. 603, *supra*, at 4. As GAO subsequently explained:

> The fact that, in final analysis, we may not be able to question the legality of particular contract transactions does not preclude our reporting to the Congress and to the responsible administrative agencies that such transactions are wasteful or extravagant or that a particular contract transaction illustrates the need for an improvement in existing procurement or management procedures.

Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts Before the Subcomm. on Military Operations of the House Comm. on Government Operations, 89th Cong., 1st Sess. 48 (1965) (statement of Comptroller General Campbell).

to-records provisions authorize the Comptroller General to examine a contractor's records in order to assess the reasonableness of the price charged the government and the adequacy of the protections afforded the government in negotiated procurements. See *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904, 914-915 (7th Cir.), cert. denied, 439 U.S. 959 (1978); *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013, 1016 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968); see also *Merck & Co.* v. *Staats*, Civil Action No. 74-1447 (D.D.C. Aug. 12, 1977), slip op. 3-4 (80-416 Pet. App. 3c-4c), appeals pending, Nos. 79-1435, 79-1438 (D.C. Cir., argued Feb. 11, 1980), conditional petition for cert. before judgment pending, No. 80-416 (filed Sept. 16, 1980). In *Eli Lilly*, the court expressly rejected the argument that the access-to-records provisions "were designed only to uncover 'improprieties in the negotiation of Government contracts,' " concluding instead "that controlling fraud was not the only purpose of the legislation and that another concern of the legislators was with excessive pricing" (574 F. 2d at 914). Similarly, the court in *Hewlett-Packard* also held that the access provisions were not limited either to audits of individual contracts or to suspected fraud (385 F. 2d at 1016):

> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs. * * *
>
> Hewlett-Packard contends, in effect, that the sole purpose of the examination right accorded by section 2313(b) and clause 10 of these contracts, is to enable the Comptroller General to find out whether the

> particular contracts which give rise to the examination had been performed in accordance with their terms and whether the contracting officer had been defrauded or misled in entering into the contract.
>
> We find nothing in the words of the statute, its legislative history, or administrative interpretation, or in the impact of other statutes, which supports this view. On the contrary, it seems to us that if such a limited scope of examination had been intended by Congress it would have found the means to so indicate. The term "contract" could have been given a restricted meaning, or the scope of the permissible examination could have been specifically limited to lines of inquiry relevant to the legality and faithful performance of the particular contract giving rise to the examination.

In the present case, the district court determined, after "resolv[ing] in favor of [petitioner] any doubt concerning whether there is a genuine issue of material fact" (Pet. App. 11a), that "[t]he uncontroverted factual record * * * establishes that GAO's purpose is to compare cost to price of drugs purchased under specified contracts to determine the adequacy of the protections afforded the government in the contract negotiation process" (*id.* at 12a; see also *id.* at 16a-17a).[8] In light of the

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[8] The district court's determination in this regard was clearly correct and amply supported by the "uncontroverted depositions and affidavits filed by the parties in connection with the motions for summary judgment" (Pet. App. 2a). See, *e.g.*, C.A. App. 58, 60-61a, 116, 123, 124-125, 202-203, 211, 231-233, 408. In addition, every court to consider the purpose underlying the Comptroller General's requests to the pharmaceutical companies has agreed that, at the least, it consisted in part of the intention "to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interest" (Pet. App. 16a). See *United States* v. *Abbott Laboratories*, 597 F. 2d 672, 674 (7th Cir. 1979); *Eli Lilly & Co.* v. *Staats*, *supra*, 574 F. 2d at 910; *Merck & Co.* v. *Staats*, *supra*, slip op. 4 (80-416 Pet. App. 4c).

foregoing authorities, the court's conclusion that this was "a purpose authorized by the statutes" (*id.* at 17a) is manifestly correct.[9] And, since the Comptroller General's request was predicated on a proper purpose, it is immaterial whether, as petitioner alleges, he was motivated by any additional purposes that, *arguendo*, would not be sufficient by themselves to sustain the validity of the request. See, *e.g.*, *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313-317 (1978); *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 285-287 (1977).[10]

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[9]Because the district court here correctly decided that "GAO seeks [petitioner's] records for the cost-price comparison authorized by the statutes" (Pet. App. 16a), it is unnecessary in this case "to determine, as did the Seventh Circuit in *Eli Lilly*, *supra*, that an industry-wide public information study is an authorized purpose for a GAO inquiry" (*id.* at 17a).

[10]We also doubt that petitioner should be heard to question these alleged additional purposes for GAO's request. Petitioner "concedes that it voluntarily executed the contracts at issue in this case with full knowledge of the access-to-records provisions contained in each contract" (Pet. App. 10a), and the Comptroller General has now invoked those provisions to seek access to records for a purpose authorized by Congress. No rule of law excuses a party from performing a contract because it does not approve of the other party's purpose in demanding performance, and petitioner should not be allowed to inquire further into the Comptroller General's motives.

Moreover, we disagree with petitioner's repeated characterization that these alleged additional purposes were "improper." Even if petitioner were correct in arguing that the access-to-records provisions do not authorize a GAO research study, it would not follow that access to the records should be barred. Petitioner confuses an "improper" motive with a motive that is perfectly legitimate but not a sufficient ground, standing alone, for access. There has been no suggestion that a research study is forbidden by law or "improper" in any similar way. The most that petitioner can say is that the Comptroller General could not compel private parties to cooperate in such a project. But no principle of law forbids the Comptroller General from using, for purposes of a research study, information lawfully obtained pursuant to some other power.

For these reasons, the decisions cited by petitioner for the proposition that "powers granted to the Government for one

2. Petitioner further contends that, under the access-to-records provisions, "GAO should be afforded access only to data that are the subject of negotiations or are relied upon by the government agencies responsible for awarding the contracts" (Pet. 7) and that no "cost records can be 'directly pertinent' to contracts which are not cost-based" (*id.* at 14).[11] This construction of the access provisions is untenable and has been consistently rejected.

Petitioner has pointed to nothing in the language of the statutes or their legislative history that would justify such a grudging interpretation of the access provisions. On the contrary, petitioner's construction would defeat the congressional objective to guard against waste, extravagance, and excessive pricing (see pages 8-9, *supra*). Petitioner's costs, even if neither directly the basis for the contract price nor the subject of discussions prior to execution of the contract, are nevertheless critical to an assessment of the advisability of continued adherence by the government to the negotiated procurement methods employed here. If petitioner's total costs are substantially lower than the prices paid by the government, the Comptroller General may recommend that the Department of Defense and the Veterans Administration adopt different procurement practices in the future. See *Hewlett-Packard Co.* v. *United States*, *supra*, 385 F. 2d at 1016 ("[w]hile this appraisal could not affect these particular contracts, it could lead to use of other methods of meeting

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purpose * * * [may not be] utilized for other purposes" (Pet. 13) are inapposite. In each of those cases, the government's request rested on a purpose that the court held was not authorized by the governing statute. None of the cases involved access requested pursuant to contract for a purpose sanctioned by law, and none held that an otherwise legitimate request was rendered invalid and unenforcible because of the asserted existence of mixed purposes.

[11]Once again, in contrast to petitioner's position, Bristol conceded that it was required by the access provisions to furnish certain cost records in these circumstances (see note 6, *supra*).

future procurement needs"). And, as the court explained in *Eli Lilly & Co.* v. *Staats*, *supra*, 574 F. 2d at 915, the "argument that Congress could not have intended to inquire into wastefulness in contracts such as the one here in which the drugs were supplied to the Government 'at a fixed price at or below the wholesale market price' * * * ignores the fact that the information sought by the Government may show that the prices it paid were nevertheless much too high."[12]

Furthermore, petitioner's construction is at odds with the administrative interpretation adopted by GAO, which is entitled to judicial deference and which Congress, although aware of the agency's position, has never disapproved. See 80-264 Pet. 16-17. This issue appears to have first been contested by Hewlett-Packard in resisting GAO access to its cost records. See *Hearings on Relation of Cost Data to Military Procurement Before the Subcomm. for Special Investigations of the House Comm. on Armed Services*, 88th Cong., 1st Sess. 15-23

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[12] This consideration is well illustrated by the testimony of GAO General Counsel Robert Keller before a congressional subcommittee:

> The catalog prices on Government orders [under sole source procurement for klystron tubes] frequently exceeded the company's current cost of production by more than 100 percent. * * *
>
> * * * * *
>
> [T]he prices accepted by the General Services Administration and paid by the military services were substantially higher than seem reasonable in relation to the contractors' costs to manufacture and sell aircraft tires, and the Government experienced unnecessary costs in its procurement of these items * * * of approximately $10.7 million [in 1960] * * *.

Hearings on Relation of Cost Data to Military Procurement Before the Subcomm. for Special Investigations of the House Comm. on Armed Services, 88th Cong., 1st Sess. 7 (1963). See also pages 15-16, *infra*.

(1963). At that time, and prior to the commencement of litigation, GAO concluded that it was entitled to examine cost records regardless of the scope of the original contract negotiations and that such records were "directly pertinent" even though the costs of performance played no part in those negotiations. *Id.* at 21-22.

GAO's interpretation has been presented to Congress on several occasions and fully explained in terms of the legislative history and purpose of the statutes and their construction by the courts. See, *e.g.*, *Hearings on Relation of Cost Data to Military Procurement Before the Subcomm. for Special Investigations of the House Comm. on Armed Services*, 88th Cong., 1st Sess. (1963), at 8 ("Our experience indicates the need for careful examination into the reasonableness of accepting catalog or other established prices for negotiated procurements * * *. The fact that a product is listed in a manufacturer's catalog and offered to any customer is no assurance that competition actually is present or that the standard catalog price is reasonable"), 10-12 (discussing *Hewlett-Packard* case), 24-25 (relation between negotiation process and right of access); *Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts Before the Subcomm. on Military Operations of the House Comm. on Government Operations*, 89th Cong., 1st Sess. (1965), at 45-46 (discussing *Hewlett-Packard* case), 512 (statement on behalf of Machinery & Allied Products Institute discussing GAO's position); 115 Cong. Rec. 25801 (1969) (GAO memorandum setting forth the agency's position, accepted in *Hewlett-Packard*, that access "is not limited to that necessary to determine whether the contracts were performed in accordance with their terms and whether the contracting officer had been defrauded or misled in entering into the contracts * * *, by what the parties may have considered

or not considered in the course of negotiations * * *, [or] by the fact that the contract was performed by the delivery of 'off-the-shelf' items not specially manufactured for the contract").

Finally, with the isolated exception of the now-reversed decision of the district court in *Eli Lilly* (see 574 F. 2d at 920, 923, 925), petitioner's position has been rejected by every court to address the issue. See *Eli Lilly & Co.* v. *Staats*, *supra*, 574 F. 2d at 914; *Hewlett-Packard Co.* v. *United States*, *supra*, 385 F. 2d at 1014, 1016; *Merck & Co.* v. *Staats*, *supra*, slip op. 2, 4 (80-416 Pet. App. 2c, 4c). See also Pet. 14 n.26; Conditional Petition for Certiorari Before Judgment in *Merck & Co.* v. *Staats*, *supra*, at 16. Even in cases of non-cost-based contracts where negotiations over price did not occur, GAO's examination of the contractor's cost records could well "lead to the use of other methods of meeting future procurement needs" (*Hewlett-Packard Co.* v. *United States*, *supra*, 385 F. 2d at 1016). And, as the court stated in refuting the same argument in *Eli Lilly* (574 F. 2d at 913, 914-915):

> In interpreting the statutory language, as the Comptroller General contends, "it is hard to imagine anything more directly related to a contract than the cost of producing the items covered by it or the matters going into the makeup of the price" * * *.
>
> * * * * *
>
> [Petitioner's] argument * * * limit[s] "directly pertinent" to an inquiry into what issues were negotiated at the time of contracting * * *. This interpretation apparently is based on the assumption that if the Government did not negotiate about an issue, it thereby considered it not to be pertinent. Such an interpretation might be reasonable if the statutory standard were that the information must be "directly

> pertinent" to the negotiation, but the standard is "directly pertinent" to the contract and plaintiff offers no reason to suppose that there would be a reason to negotiate about each item that might have a significant effect on the seller's cost or performance. * * *
>
> In the final analysis, [petitioner's] suggested interpretation of examining what was negotiated rests on its conclusion that Sections 2313 and 254 were designed only to uncover "improprieties in the negotiation of Government contracts" * * *. However, * * * controlling fraud was not the only purpose of the legislation and * * * another concern of the legislators was with excessive pricing. Given this latter purpose and our view of the meaning of "directly pertinent," the access-to-records clauses should be interpreted so that an item is "directly pertinent" to a contract if it is a significant input in the cost of the product purchased in the contract.

3. Apart from the lack of merit to its substantive arguments, petitioner has failed to demonstrate that the instant case warrants the extraordinary course of review by this Court before judgment in the court of appeals. Petitioner does not contend that the issues it seeks to raise are "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 18. Compare, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Petitioner does assert, however, that considerations of sound judicial administration militate in favor of certiorari before judgment in this case. We disagree.

In essence, petitioner seeks to present two questions that have not divided the courts of appeals and are not

otherwise appropriate for this Court's review. Indeed, the Court has already declined to hear these very questions in the absence of such a conflict. See *Eli Lilly & Co.* v. *Staats*, cert. denied, 439 U.S. 959 (1978). Petitioner has suggested no reason for a different disposition of this case even after decision by the court of appeals, and certainly none that would provide sufficient grounds for circumventing that court by means of certiorari before judgment.

Prudent judicial administration does not counsel a contrary result. Notwithstanding petitioner's apprehensions, it is a distinct possibility, especially in light of *Eli Lilly*, that the Court will never need to confront the two issues raised here. On the other hand, if a conflict does develop, there will be time enough then to petition for certiorari at a point when this Court would have the benefit of full ~~exploitation~~ explication of the courts of appeals' divergent views.[13] Moreover, insofar as petitioner wishes to be heard on the question presented in *Bristol*—as to which there *is* currently a conflict in the circuits—it can be fully accommodated through the opportunity to appear as an *amicus curiae*. In sum, to grant the instant petition for certiorari before judgment, or to deny the petition in *Bristol* with the expectation of subsequently granting certiorari in *SmithKline* or *Merck* after final judgment in the court of appeals, would needlessly involve the Court in the resolution of issues that plainly do not warrant review and is unnecessary to protect petitioner's legitimate interests.

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[13]We note that petitioner has urged the court of appeals, as one disposition of the case, to vacate the judgment of the district court and remand for further factual proceedings on the question of GAO's purpose in requesting access to petitioner's records (SmithKline Br. 29-34; see also Pet. App. 10a). Thus, even after the court of appeals has rendered a decision, it is possible that the case would be interlocutory in nature and therefore unsuited to review in this Court.

Petitioner is not aided in any way by the cases it cites regarding certiorari before judgment (Pet. 16-17). None of those cases concerned an attempt, as here, to interject new and separate issues into a pending proceeding. Rather, in each of the cited instances, the issues raised in the respective cases were substantially identical. Moreover, on each occasion, the decisions under review either involved the same court of appeals, so that the circuit had already passed upon the legal question presented in the petition for certiorari before judgment,[14] or pertained to a single dispute and presented potentially inconsistent legal obligations that could not be jointly fulfilled by the parties.[15] No comparable circumstances are presented in this case, and the exceptional procedure for certiorari before judgment is inappropriate here.[16]

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[14]See *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946), and *Porter* v. *Lee*, 328 U.S. 246, 251 n.3 (1946); *Johnson* v. *Fleet Corp.*, 280 U.S. 320, 322-325 (1930). See also *Taylor* v. *McElroy*, 360 U.S. 709, 709-710 (1959), and *Greene* v. *McElroy*, 360 U.S. 474 (1959).

[15]See *New Haven Inclusion Cases*, 399 U.S. 392, 414, 418 (1970); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963). See also *Washington* v. *Fishing Vessel Assn.*, 443 U.S. 658, 671-674 (1979); *Hannah* v. *Larche*, 363 U.S. 420, 422-423 & n.3, 428-430 (1960).

[16]An analogous situation would exist here if, for example, petitioner had filed suit in one district court to enjoin GAO's request and the government had brought an action in another district court to enforce the request; in the event the Court granted certiorari in one of these cases after judgment in the court of appeals, it might not be inappropriate (although it would hardly be necessary) to grant certiorari before judgment in the other case if the litigated issues were substantially identical and if either the two cases arose in the same circuit or divergent decisions would impose incompatible legal duties on the parties. In contrast, the instant petition does not implicate these considerations in support of certiorari before judgment.

CONCLUSION

The conditional petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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NOVEMBER 1980

DOJ-1980-11

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SMITHKLINE CORPORATION, *Petitioner,*

v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, AND THE UNITED STATES, *Respondents.*

On Conditional Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY OF PETITIONER

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REPLY OF PETITIONER

Ultimately the question presented here is the efficient utilization of limited judicial resources. It is undisputed that this case, in addition to *Merck & Co.* v. *Staats,* No. 80-416 (filed Sept. 16, 1980), and *Staats* v. *Bristol Laboratories,* No. 80-214 (filed Aug. 21, 1980), all arise from identical demands made by the General Accounting Office at the same time, for the same purpose and as parts of the same inquiry. The cases differ merely in that, unlike *SmithKline* and *Merck, Bristol* presents only one aspect of the issues arising from the controversy with GAO, and a decision by this Court in *Bristol* cannot resolve the remaining issues presented in the other two cases.

In these circumstances, considerations of sound judicial administration indicate strongly that this case and *Merck* should, if the Court were to grant certiorari in *Bristol,* also be resolved at the same time.

This case is now pending before the Third Circuit, while *Merck* is now before the District of Columbia Circuit, and there is nothing in law or logic to dictate that this Court and two courts of appeals should simultaneously be burdened with interrelated aspects of a single controversy. The inefficiency of such an arrangement is compounded by the genuine possibility that the *SmithKline* and *Merck* courts might differ in their results from each other or from other previous decisions, thus stimulating one or more additional petitions for certiorari and still further proceedings in this Court.[1]

The wastefulness of the existing situation may be alleviated by either of two steps. This Court may, as we urged in the conditional petition, deny certiorari in *Bristol* and await the results of the two pending proceedings in the courts of appeals. As we explained in the petition, the result reached by the Second Circuit on the limited issue before it in *Bristol* is, in any event, clearly correct. Alternatively, if the Court were nonetheless to grant certiorari in *Bristol,* it might still resolve all these cases at one time and in a single decision by also granting the conditional petitions here and in *Merck*. This would eliminate both needless proceedings in the courts of appeals and the prospect of further burdens on this Court.

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[1] While it is true that no conflict among circuits now exists on the broader issues presented here and in *Merck*, but not in *Bristol*, the only court of appeals yet to have decided those issues in the five cases arising from GAO's demands is the Seventh Circuit, and, as we have pointed out in the conditional petition, the judges of that court divided in the two cases before them, with the panel in *United States* v. *Abbott Laboratories*, 597 F.2d 672 (7th Cir. 1979), only reluctantly following that court's earlier decision in *Eli Lilly & Co.* v. *Staats*, 574 F.2d 904 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978). Even if the circuits are not yet divided, the judges of the single circuit to have confronted the issues are already in disagreement.

The consolidation of all three cases for a single hearing would have another important advantage. Such a step would bring before the Court all of the issues of statutory construction raised by the access-to-records provisions at one time, in a proceeding in which all those interrelated issues could be resolved simultaneously, each in light of the others. Further, it would assure presentation to the Court of all of the pertinent legislative and administrative history of the access provisions, a presentation which it cannot be assumed will be made by the parties in *Bristol,* because of the narrow question there involved. The incomplete extracts from that history offered by respondents in their brief in opposition to the petition only confirm the importance of a more comprehensive presentation to the Court.

CONCLUSION

For reasons stated above and in the conditional petition for certiorari, certiorari in *Staats* v. *Bristol Laboratories,* No. 80-214, should be denied. Alternatively, if certiorari were to be granted there, it should also be granted in this case.

Respectfully submitted,

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November 20, 1980

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